

Honorable Robert B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

THE WATTLES COMPANY, a Washington  
corporation,

Plaintiff,

vs.

VERLAN FIRE INSURANCE COMPANY, a  
New Hampshire corporation, et al.,

Defendants.

No. 3:14-cv-05097-RBL

DEFENDANT VERLAN FIRE  
INSURANCE COMPANY'S MOTION FOR  
SUMMARY JUDGMENT DISMISSAL RE:  
PLAINTIFF'S CLAIMS

**Noted for Consideration:  
Friday, July 11, 2014**

**I. RELIEF REQUESTED**

Verlan Fire Insurance Company ("Verlan") respectfully requests the Court to enter an order dismissing plaintiff The Wattles Company's ("Plaintiff" and/or "Wattles") claims against Verlan pursuant to the "known loss" doctrine. The alleged damages caused by Exide Corporation's ("Exide") former operations at Plaintiff's property were known by Plaintiff prior to procuring Verlan's first party property insurance policies for the November 1, 2011 to November 1, 2012 and November 1, 2012 to November 1, 2013 policy periods.

## II. STATEMENT OF FACTS

### A. Plaintiff's Use of Property / Lease to Exide Technologies.

The subject property is located at 1901-2005 Fryer Avenue, Sumner, Washington, an industrial / warehousing area. (*See* Dkt. #3). Lead-acid battery operations, including battery assembly, filling, and charging were conducted at the property from 1981 – 2009 [28 years].

Wattles entered into a lease agreement with GWB Corporation (nka Exide Technologies) on August 11, 1981 for the October 1, 1981 to September 30, 1986 lease term. (*See* Declaration of Martin J. Pujolar [“Pujolar Dec.”] submitted herewith, ¶2). The leased property is located in Sumner, Pierce County, Washington, and included “Northerly 86,400 square feet of Lot 2” and “approximately 85,000 square feet of property adjoining to the west as shown on Exhibit “A””. (*Id.*) Under the terms of the lease, Exide used the demised premises for “marketing, processing, and storage of battery products and related activities.” (*Id.*)

On August 11, 1986, Wattles entered into a lease agreement with General Battery Corporation [GWB Corporation’s parent company] for the October 1, 1986 to September 30, 1996 lease term. (*Id.* at ¶3). The leased property and use thereof remained the same as the October 1, 1981 to September 30, 1986 lease. (*Id.*)

On August 2, 1999, Wattles entered into a lease agreement with Exide Corporation for the October 1, 1999 to September 30, 2009 lease term. (*Id.* at ¶4). The leased property remained the same, but included the address “1911-2001 Fryar Avenue”. (*Id.*) The use of the property included “marketing, processing, distribution, and storage of lead-acid batteries, battery products and related activities.” (*Id.*) In addition to filling and charging batteries,

Exide stored and used hazardous materials and performed wastewater recycling and treatment at the property.

On August 2, 1999, an Addendum was added to the August 2, 1999 lease between Wattles and Exide. (*Id.* at ¶5). The Addendum states, in part:

Landlord and tenant agree that tenant has made modifications and additions to the premises under the prior lease...and that the premises has experienced extraordinary (i.e. beyond normal) wear and tear during the period of the prior leases by virtue of the tenants activities on the premises...

\* \* \* \* \*

Tenant acknowledges that **extraordinary wear and tear has occurred to the building in general and specifically to the floor in the area of the battery formation an acid farm area...**

\* \* \* \* \*

Tenant agrees that prior to the end of the term of the Lease or any sooner termination, Tenant will remove any structures and make any and all repairs necessary to remedy the affect Tenant's activities on the Premises ...

\* \* \* \* \*

... Tenant shall be specifically required to take all remedial action and to clean-up and remove from the Premises the contaminants, hazardous materials or environmental waste which may have been generated by Tenants and/or are present on the Premises by virtue of Tenants' activities between August 11, 1981 and the termination of the Lease. Any such remedial actions shall be undertaken to achieve a clean-up standard that is consistent with the applicable government requirements, laws and regulations ...

(*Id.*)

Exide ceased their battery "formation" operations in 2009 and were merely storing batteries at the location thereafter. Exide sent a letter to Puget Sound Clean Air Agency, dated October 16, 2009, stating in pertinent part:

1 As of March 31, 2009, Exide Technologies has discontinued filling and  
2 charging batteries at its facility at 2005 Fryar Ave., Sumner, WA 98390.

3 All of the filling and charging equipment (emission sources), acid  
4 storage tanks and water treatment equipment have been removed from  
5 the building. ...

6 Due to the fact that Exide has ceased these operations and removed the  
7 source of emissions from the facility, Exide requests the termination of  
8 the Notice to Construction #9644 and Registration #28521.

9 \* \* \* \* \*

10 (*Id.* at ¶6).

11 In August 2009, the lease between Wattles and Exide was amended to reduce the leased  
12 square footage to 33,946 sf. and to extend the term of the lease three years until September 30,  
13 2012. (*Id.* at ¶7). Exide ceased its battery “formation” operations in 2009 and were merely  
14 storing batteries at the location. The subject property [1901 – 2005 Fryar Avenue, Sumner,  
15 WA 98390] has been vacant from at least September 30, 2012, if not earlier.

16 **B. Examination Under Oath of Plaintiff**

17 The Examination Under Oath (“EUO”) of Craig B. Wattles regarding the alleged loss  
18 and damages at the subject property was conducted on January 24, 2014. (*See* Pujolar Dec.,  
19 ¶8). Mr. Wattles has been the president of The Wattles Company since 1983 and testified as a  
20 representative and on behalf of The Wattles Company. (*Id.*; p. 9, ln. 10-25). Mr. Wattles  
21 alleges that the entire wood truss and roof system is damaged as well as areas of eroded  
22 concrete. (*Id.*; p. 34, ln. 4-21). According to Mr. Wattles, the alleged damage to the roofing  
23 system [trusses and structural support] and concrete was caused by the release of acid from  
Exide’s former battery formation operation which was “deposited throughout all surfaces of the

1 building.” (*Id.*; p. 43, ln. 8-24). The alleged property damage for which Plaintiff seeks  
2 coverage was caused by Exide’s activities:

3 Q. So was it The Wattles Company position that Exide caused the property  
4 damage.

5 A. The – yes, Exide’s activities resulted.

6 Q. In the property damage that we’re talking about today?

7 A. Yes.

8 (*Id.*; p. 44, ln. 11-15).

9 Mr. Wattles observed concrete damage from Exide’s operation in 1999, if not earlier.  
10 (*Id.*; p. 50, ln. 7-12). Mr. Wattles was aware of concrete damage from Exide’s operation and  
11 the release of sulfuric acid in 1999. (*Id.*; p. 54, ln. 5-10; p. 54, ln. 18 – p. 55, ln. 5). Mr.  
12 Wattle’s expected the concrete damage to continue to occur over the life the lease with Exide.  
13 (*Id.*; p. 56, ln. 5-8). This is the same type of concrete damage for which Plaintiff is seeking  
14 recovery in this matter. (*Id.*; p. 53, ln. 8-13).

15 Mr. Wattles confirmed that Exide moved out of the premises in 2009. (*Id.*; p. 41, ln. 1-  
16 2). Mr. Wattles testified that Plaintiff became aware of “problems” at the property in late 2010  
17 or early 2011, including truss breaks and staining of the concrete floors caused by dripping of  
18 “material” from the above-ground structures. According to Mr. Wattles, there was  
19 “significant” main truss break in 2010 allegedly affecting the strength of the building. (*Id.*; p.  
20 38, ln. 7-22). Mr. Wattles’ reported the truss break to The Wattles Company’s insurer covering  
21 the property at the time [Fireman’s Fund / Allianz]. (*Id.*; p. 38, ln. 7-22; p. 11, ln. – p. 12, ln.  
22 15). Shortly thereafter, Mr. Wattles observed stained concrete caused by dripping of “material”  
23 from the structures above:

1 A. ... Exide, when they moved out, they replaced all of the floors in the  
2 formation area. So, there's a brand new concrete floor. And we were  
3 walking the building, and we noticed a grid pattern of staining on the  
4 concrete. ... And then we looked up and noticed that it was directly  
5 underneath the fire lines and under the truss lines. Due to the coloration  
6 of it, we were concerned.

7 Exide brought in Phillips Service to do a complete environmental  
8 cleaning of the building when they moved out. To see staining after an  
9 environmental company has cleaned the building was concerning. So,  
10 then we brought in an environmental company to test it. And it was a  
11 problem. It showed we had a problem.

12 Q. Let me just clarify a couple of things. This grid pattern that you were  
13 noticing in the concrete, **this was happening in 2010; is that right?**

14 A. **That's when we first noticed it.**

15 (*Id.*; p. 40, ln. 6-25). (Emphasis added).

16 Mr. Wattles further testified that water condensed on the trusses to the point where it  
17 dripped to the floor resulting in the 2010 grid patterns on the concrete:

18 A. ... the building is not heated, but the [prior] manufacturing [by Exide]  
19 provided enough heat. The sprinkler systems are ... wet systems,  
20 meaning they contain water all year round ...

21 Wet systems are subject to freezing. We had a cold snap, so we brought  
22 in kerosene heaters to heat the space, make sure we didn't freeze. Those  
23 – since you're – the combustion is in the building, you put out a lot of  
water into the air, and the water condensed. Water condensed on the  
upper structure to the point where it dripped. If we hadn't done that,  
might not have noticed it.

Q. So you think those drips were actually what was causing the grid pattern  
on the concrete?

A. The grid – **the water was pulling material – dripping the material  
that was already up there down.** (Emphasis added).

(*Id.*; p. 41, ln. 16 to p. 42, ln. 9).

1 It was at this time, i.e. late 2010 or early 2011, that Plaintiff started “looking at the  
2 environmental conditions” as the cause of damage to the building. (*Id.*; p. 40, ln. 1-21).  
3 Plaintiff is seeking to recover the exact same property damages in this matter against the  
4 Defendant insurers that it is seeking to recover from Exide in Pierce County Superior Court.  
5 (*Id.*; p. 61, ln. 9-17).

6 **C. Plaintiff’s Pre-Suit Claims Re: Exide.**

7 Plaintiff, The Wattles Company, hired Environmental Management Services, LLC  
8 (“EMS”) to complete a site reconnaissance and environmental assessment of the subject  
9 property. (*See* Pujolar Dec., ¶9). EMS prepared a written report for Plaintiff, dated January 28,  
10 2011. (*Id.*) The objective of EMS’s investigation was to review the environmental conditions  
11 related to Exide’s former battery manufacturing operations to identify the environmental  
12 impact to the structure and property as a result of Exide’s operations. (*Id.*) On **January 20,**  
13 **2011**<sup>1</sup>, EMS met onsite with Wattles Company representative Taylor Balduff, and conducted a  
14 site investigation. (*Id.*) EMS used a scissor lift to inspect the building trusses. (*Id.*) EMS  
15 reported the following regarding its inspection of the building trusses:

16 EMS personnel used a scissor lift, provided by the Wattles Company, to inspect  
17 several trusses and joints. **There was a burned/charred appearance (Photo**  
18 **01) to all of the horizontal truss surfaces.** The trusses at the far northeast  
19 (Figure 1) appeared to be more severely charred, with a curled and peeled  
20 surface. The majority of the beams had a blackened surface which was sticky to  
21 the touch. **All of the metal truss plates and rivets exhibited extreme**  
22 **corrosion** (Photo 04). **White oxidized material was present at a depth of**  
23 **0.25 to 0.50 inches on all of metal surfaces inspected.** This included pipes,  
heating ducts, and structural supports as well as the truss joints and plates. The  
oxidation of the metal and the charring of the wood appeared to decrease as the  
distance from the north wall increased. (*Id.*) (Emphasis added).

<sup>1</sup> EMS produced a report dated **January 28, 2011.** (*See* Pujolar Dec., ¶9). Figure No. 2 to Attachment “A” of the  
report contains photographs of “residue” and corrosion on the trusses, truss joints, truss plates and piping. (*Id.*)  
The photographs are dated **January 4, 2010.** (*Id.*)



1 EMS also inspected staining on the concrete floor and concrete post supports. (*Id.*)  
 2 EMS observed extreme staining and pitting of the cement floors and walls of the building. (*Id.*)  
 3 The floor staining and pitting was spread throughout the structure and appeared at regular  
 4 intervals under the truss joints. (*Id.*)

5 EMS concluded and advised Wattles that “the low pH levels found on surfaces and  
 6 duct systems at the site constitute a potential problem for the structural integrity of the building.  
 7 It is highly probable that the cement has been impregnated with lead and the ground beneath  
 8 the cement and outside the building may be impacted.” (*Id.*)

9 On or about **March 1, 2011**, Plaintiff’s counsel at the time, Kurt B. Peterson of the  
 10 Cascadia Law Group, sent a letter to Exide demanding Exide to take action to “mitigate  
 11 Wattles’ ongoing damages.” (*See* Pujolar Dec., ¶10). Plaintiff’s letter provides in part:

12 In Wattles’ effort to release the space, Wattles discovered that the vacated space  
 13 continues to present significant environmental, health, and safety concerns as a  
 14 result of Exide’s activities at the Premises and remaining contamination. Wattles engaged Environmental Management Services, LLC to perform an  
 15 environmental assessment of the Premises, a copy of which is enclosed. Wattles  
 16 has been compelled to remove the property from the market, and it remains  
 17 unleaseable and unmarketable in its present condition. **Wattles has been and**  
 18 **continues to be significantly damaged.** (Emphasis added).

19 (*Id.*)

20 On **April 8, 2011**, Plaintiff’s counsel, Joseph Rehberger of the Cascadia Law Group,  
 21 sent Exide a follow-up letter demanding Exide to take action to resolve Plaintiff’s ongoing  
 22 damages from Exide’s former operations. (*See* Pujolar Dec., ¶11).

23 On **April 25, 2011**, Plaintiff’s counsel, Joseph A. Rehberger of Cascadia Law Group,  
 sent Exide a “Renewed Notice of Default and Demand.” (*See* Pujolar Dec., ¶12). Plaintiff  
 reiterated that “it has been and continues to be damaged by and suffer losses directly resulting



1 from the residual contamination left at the Vacated Space following Exide's vacation of the  
 2 same." (*Id.*) **Plaintiff further stated that it continued to incur damages related to the**  
 3 **hazardous waste, contamination, and structural integrity issues arising out of Exide's**  
 4 **activities.** (*Id.*) Plaintiff attached a draft complaint to its **April 25, 2011 letter.** (*Id.*) The  
 5 complaint alleged the following:

- 6 • 3.8 In or around **January 2011**, Wattles retained Environmental  
 7 Management Services ("EMS") to complete a limited environmental review and  
 8 assessment of the environmental conditions at the Vacated Premises and  
 9 associated property as a result of Exide's operations. EMS's investigation  
 10 verified the presence of a number of environmental issues of concern, including  
 11 high concentrations of lead, chromium, and hexavalent chromium, and  
 12 concluded that that presence of these hazardous substances constitute a health  
 13 and safety issue. ... (Emphasis added).
- 14 • 3.9 EMS also verified low pH levels on the surface of overhead beams, the  
 15 metal surfaces of the truss structures, and duct systems. EMS concluded that the  
 16 low pH levels constitute a potential problem for the structural integrity of the  
 17 warehouse building.
- 18 • 3.12 Despite demand, Exide has refused to investigate, address, or remediate  
 19 issues related to the structural integrity of the warehouse building.
- 20 • 3.13 Despite demand, Exide has refused to indemnify and reimburse Wattles  
 21 for costs Wattles has incurred to investigate and address remediation issues  
 22 related to environmental concerns and structural integrity of the Vacated  
 23 Premises.
- 3.14 Because of the unremedied environmental, health and safety, and  
 structural concerns resulting from Exide's tenancy of the Vacated Premises,  
 Wattles is unable to market the Vacated Premises and associated property for  
 rent, lease, or sale.

20 (*Id.*)

21 Mr. Wattles testified during his EUO that Plaintiff is seeking to recover the exact same  
 22 property damages in this matter against the Defendant insurers, including Verlan, that it is  
 23 seeking to recover from Exide in Pierce County Superior Court. The draft complaint attached

1 to Plaintiff's April 25, 2011 letter to Exide includes the same allegations as Plaintiff's  
 2 complaint ultimately filed against Exide in Pierce County Superior Court on March 28, 2013  
 3 [discussed below].

4 **D. Verlan's Insurance Policies.**

5 Verlan Fire Insurance Company issued the following first party insurance policies to  
 6 The Wattles Company:

- 7 • Verlan policy no. M00275711, effective November 1, 2011 – November 1, 2012
- 8 • Verlan policy no. M00275712, effective November 1, 2012 – November 1, 2013<sup>2</sup>

9 (*Id.* at ¶13 and ¶14).

10 One of the insured locations under Verlan's policies is 1901-2005 Fryer Avenue,  
 11 Sumner, Washington 98390. (*Id.*) Verlan's policy no. M00275712, effective November 1,  
 12 2012 – November 1, 2013, was a renewal of Verlan policy no. M00275711, effective  
 13 November 1, 2011 – November 1, 2012. (*Id.*) The Verlan policies and contains the same  
 14 policy terms, conditions, and exclusions. (*Id.*) Verlan's "policy applies only to losses that  
 15 occur during the policy period[s]" and does not provide coverage for vacant or idle buildings or  
 16 business income and expenses. (*Id.*)

17 **E. Plaintiff's Lawsuit Against Exide.**

18 On March 28, 2013, Plaintiff The Wattles Company filed a complaint against Exide  
 19 Technologies, Inc. and Exide Corporation in Pierce County Superior Court, Case No. 13-2-  
 20 07695-6, asserting causes of action for Breach of Contract, Washington Model Toxics Control  
 21 Act, Declaratory Judgment, Trespass, Nuisance, Breach of Duty of Good Faith, Negligence,

22 <sup>2</sup> Plaintiff has agreed to dismiss its claims against Verlan policy no. M00275712, effective  
 23 November 1, 2012 – November 1, 2013. The parties will be submitting a stipulation and order for  
 dismissal.

1 Property Damage, and Strict Liability for Abnormally Dangerous Activity. (*Id.* at ¶15).

2 Plaintiff's complaint against Exide alleges the following:

- 3 • 3.3 Wattles and Exide entered into a written lease agreement dated August 2,  
4 1999, and executed in October 1999.
- 5 • 3.4 Exide has used the warehouse building and Property as a lead acid  
6 battery manufacturing facility since on or around August 11, 1981.
- 7 • 3.13 Exide has admitted that the Property experienced damages beyond  
8 normal wear and tear due to Exide's activities and the Property both in general  
9 and specifically to the floor area in the battery formation and acid farm area at  
10 the Property.
- 11 • 3.14 In 2009, Exide vacated the approximate north half of the warehouse  
12 building (the "Vacated Premises"). In or around September 2009, Exide and  
13 Wattles entered into a First Amendment of Lease which reduced the leased  
14 portion of the warehouse building and Property to approximately 32,446 square  
15 feet of warehouse building space and approximately 1,500 square feet of office  
16 space.
- 17 • 3.15 Exide's lease of the Vacated Premises ceased and terminated on  
18 September 30, 2009.
- 19 • 3.18 In or around **January 2011**, Wattles retained Environmental  
20 Management Services ("EMS") to complete a limited environmental review and  
21 assessment of the environmental conditions at the Vacated Premises and  
22 associated property as a result of Exide's operations. (Emphasis added).
- 23 • 3.19 EMS's investigation verified the presence of a number of environmental  
issues of concern, including high concentrations of lead, chromium, and  
hexavalent chromium, and concluded that the presence of these substances  
constitutes and health and safety hazard.
- 3.20 EMS also verified low pH levels on the surface of overhead beams, the  
metal surfaces of the truss structures, and duct systems. EMS concluded that the  
low pH levels have compromised and continue to threaten the structural  
integrity of the warehouse building.
- 4.9 Exide failed to keep the property in good order, condition, and repair  
insofar as Exide's operations resulted in significant damage to the floor, walls,  
ceiling, beams, pipes, and other structural elements of the Property. ... (*Id.*)

1 On or about July 11, 2013, a Notice of Stay of Plaintiff's lawsuit against Exide was  
 2 filed in Pierce County Superior Court pending Exide's bankruptcy proceedings. (*Id.* at ¶16).

3 **F. Plaintiff's Claims Re: Verlan and Defendant Insurers**

4 On or about September 27, 2013 [subsequent to Exide's bankruptcy filing], Plaintiff's  
 5 counsel sent a Notice of Loss on behalf of Plaintiff to Plaintiff's insurance brokers, Wells Fargo  
 6 Insurance and Propel Insurance, requesting the Notice of Loss to be transmitted to all carriers  
 7 issuing policies to Plaintiff from 1982 – 2013. (*Id.* at ¶17). On or about October 4, 2013,  
 8 Plaintiff's counsel sent Plaintiff's First Supplemental Notice of Loss to Wattles' insurance  
 9 brokers identifying additional policies. (*Id.* at ¶18). Verlan received notice of the loss for the  
 10 first time on October 8, 2013. (*Id.* at ¶19). On October 11, 2013, Verlan sent a letter to  
 11 Plaintiff's counsel acknowledging Plaintiff's Notice of Loss. (*Id.* at ¶20). On October 23,  
 12 2011, Verlan sent a reservation of rights letter to Plaintiff's counsel advising that Verlan was in  
 13 the process of investigating the loss, including investigation of the date of discovery,  
 14 assessment of damages, and review of supporting documents. (*Id.* at ¶21). On October 28,  
 15 2013, Plaintiff's counsel provided notice that access to the site would be provided to the  
 16 insurers on November 13, 2013. (*Id.* at ¶22). Verlan participated in the project inspection.

17 On or about January 15, 2014, Plaintiff produced a copy of WJE's scope of repair  
 18 report. (*Id.* at ¶23). On or about January 27, 2014, Plaintiff's counsel produced Sellen  
 19 Construction's cost or repair estimate based upon WJE's repair recommendations and  
 20 requested the insurers' coverage determination at their "earliest opportunity". (*Id.* at ¶24).  
 21 Thereafter, despite the insurers' ongoing investigation based upon Plaintiff's recent and  
 22  
 23

1 ongoing production of information [i.e. WJE and Sellen reports], on February 4, 2014, Plaintiff  
2 filed suit against the defendant insurers, including Verlan. (*See* Dkt. #3).

3 Plaintiff alleges that its property located at 1901-2005 Fryer Avenue, Sumner,  
4 Washington has sustained direct physical loss and/or damages due to perils covered, and not  
5 excluded, by the policies of insurance issued by the defendant insurers, including Verlan. (*Id.*)  
6 Plaintiff alleges that defendant insurers have wrongfully refused to properly investigate or  
7 acknowledge coverage for the damages, losses, costs, fees, liabilities, and expenses incurred or  
8 to be incurred by Plaintiff related to the property. (*Id.*) Plaintiff is seeking to recover the exact  
9 same property damages in this matter against the Defendant insurers that it is seeking to  
10 recovery from Exide in Pierce County Superior Court. (*Id.* at ¶8; p. 61, ln. 9-17).

### 11 **III. ISSUE PRESENTED**

12 Whether Plaintiff's claims against Verlan should be dismissed where the alleged  
13 damages caused by Exide Corporation's former operations were known by Plaintiff prior to the  
14 procurement of Verlan's first party property insurance policies for the November 1, 2011 to  
15 November 1, 2012 and November 1, 2012 to November 1, 2013 policy periods?

### 16 **IV. EVIDENCE RELIED UPON**

17 This motion is based upon the records and pleadings already on file in this matter and  
18 the Declaration of Martin J. Pujolar and exhibits attached thereto.

### 19 **V. AUTHORITY/ARGUMENT**

#### 20 **A. Summary Judgment Standard.**

21 Summary judgment is proper when the pleadings, depositions, and admissions on file  
22 demonstrate that there is no genuine issue of material fact and that the moving party is entitled  
23

1 to judgment as a matter of law. CR 56 (c); *Kesinger v. Logan*, 113 Wn.2d 320, 325, 779 P.2d  
 2 263 (1989). The party opposing summary judgment must submit “competent testimony setting  
 3 forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of  
 4 material fact.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). If a  
 5 non-moving party fails to make a showing sufficient to establish the existence of an element of  
 6 that party’s case, and on which that party bears the burden of proof at trial, then summary  
 7 judgment should be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770  
 8 P.2d 182 (1989).

9 **B. Plaintiff’s claims against Verlan are precluded by the “Known Loss” Doctrine.**

10 The “known loss” doctrine is also referred to as the “loss-in-progress” doctrine.  
 11 *Hillhaven Properties Limited v. Sellen Construction Company, Inc.*, 133 Wn.2d 751, 758, 948  
 12 P.2d 796 (1997). The “known loss” doctrine applies to first-party and third-party insurance  
 13 cases. *Id.* at 768. The “known loss” doctrine prevents an insured from collecting on an  
 14 insurance policy where, prior to policy inception, the insured possessed knowledge of a  
 15 “substantial probability” that it would face the same type of loss or suit that eventually  
 16 occurred. *Pub. Util. Dist. No. 1 v. Int’l Ins. Co.*, 124 Wn.2d 789, 807-08, 881 P.2d 1020  
 17 (1994).

18 In *Time Oil Company v. Cigna Property & Casualty Insurance Company*, 743 F. Supp.  
 19 1400, 1414-1415 (W. D. Wash. 1990), the court, applying Washington law, held that the risk of  
 20 liability is known if the insured receives notice indicating a substantial probability that a loss  
 21 would occur. The Court in *Time Oil* found that there was no coverage because the process  
 22 causing the loss had already begun. *Id.* at 1415; *see also, City of Okanogan v. Cities Insurance*  
 23



1 *Association*, 72 Wn. App. 697, 701 (1994) (if an event causing loss is not unknown prior the  
 2 effective date of the policy, there is no coverage). *Accord*, *Town Tieton v. General Insurance*  
 3 *Company of America*, 61 Wn.2d 716, 380 P.2d 127 (1963). The dispositive issue is whether  
 4 the insured had notice prior to purchasing the policy. *Overton v. Consolidated Ins. Co.*, 145  
 5 Wn.2d 417, 426, 38 P.3d 322 (2002).

6 Here, Plaintiff was on notice and knew that Exide's former operations were causing  
 7 damage to the property prior to the effective date of Verlan's November 1, 2011 policy. On or  
 8 about August 2, 1999, an Addendum was added to the August 2, 1999 lease between Wattles  
 9 and Exide acknowledging that Exide's operations and activities were causing "extraordinary  
 10 wear and tear ... **to the building in general** and specifically to the floor in the area of the  
 11 battery formation an acid farm area". (See Pujolar Dec., ¶5). Plaintiff had knowledge in 1999  
 12 [if not earlier] that Exide's operations were causing damage "to the building in general."

13 Mr. Wattles testified during is Examination Under Oath that the alleged damage to the  
 14 roofing system [trusses and structural support] and concrete was caused by the release of acid  
 15 from Exide's former battery formation operations which was "deposited throughout all surfaces  
 16 of the building." (See Pujolar Dec., ¶8; p. 43, ln. 8-24). Consistent with the 1999 lease  
 17 addendum, Mr. Wattles observed concrete damages from Exide's operations and release of  
 18 sulfuric acid in 1999, if not earlier. (*Id.*; p. 50, ln. 7-12; p. 54, ln. 5-10; p. 54, ln. 18 – p. 55, ln.  
 19 5). This is the same type of damage for which Plaintiff is seeking recovery in this matter. (*Id.*;  
 20 p. 53, ln. 8-13). Mr. Wattle's expected the concrete damage to continue to occur over the life  
 21 the lease with Exide. (*Id.*; p. 56, ln. 5-8).



Mr. Wattles further testified that Plaintiff noticed and was aware of “problems” at the property in late 2010 or early 2011, including truss breaks and staining of the concrete floors caused by dripping of “material” [sulfate dust] from the trusses above. There was a “significant” main truss break in 2010 allegedly affecting the strength of the building. (*Id.*; p. 38, ln. 7-22). Mr. Wattles’ reported the truss break to The Wattles Company’s insurer covering the property at the time [Fireman’s Fund / Allianz]. (*Id.*; p. 38, ln. 7-22; p. 11, ln. – p. 12, ln. 15). Shortly thereafter, Mr. Wattles observed stained concrete caused by dripping of “material” [sulfate dust] from the structures [i.e. trusses] above. (*Id.*; p. 40, ln. 6-25; p. 41, ln. 16 to p. 42, ln. 9). Mr. Wattles testified that it was at this time, i.e. late 2010 or early 2011, that Plaintiff started “looking at the environmental conditions” as the cause of damage to the building. (*Id.*; p. 40, ln. 1-21). Mr. Wattles testified that Plaintiff is seeking to recover the exact same property damages in this matter against the Defendant insurers that it is seeking to recover from Exide in Pierce County Superior Court. (*Id.*; p. 61, ln. 9-17).

Plaintiff hired Environmental Management Services, LLC (“EMS”) to complete a site reconnaissance and environmental assessment to identify the environmental impact to the structure and property as a result of Exide’s operations. (See Pujolar Dec., ¶9). On January 20, 2011, EMS conducted a site inspection. EMS produced a report to Plaintiff, dated January 28, 2011, reporting the following regarding the building trusses:

EMS personnel used a scissor lift, provided by the Wattles Company, to inspect several trusses and joints. **There was a burned/charred appearance (Photo 01) to all of the horizontal truss surfaces.** The trusses at the far northeast (Figure 1) appeared to be more severely charred, with a curled and peeled surface. The majority of the beams had a blackened surface which was sticky to the touch. **All of the metal truss plates and rivets exhibited extreme corrosion** (Photo 04). **White oxidized material was present at a depth of 0.25 to 0.50 inches on all of metal surfaces inspected.** This included pipes,

1 heating ducts, and structural supports as well as the truss joints and plates. The  
 2 oxidation of the metal and the charring of the wood appeared to decrease as the  
 distance from the north wall increased. (*Id.*) (Emphasis added).

3 EMS also observed extreme staining and pitting of the cement floors and walls of the  
 4 building. (*Id.*) The floor staining and pitting was spread throughout the structure and appeared  
 5 at regular intervals under the truss joints. (*Id.*) EMS concluded and advised Wattles that “the  
 6 low pH levels found on surfaces and duct systems at the site constitute a potential problem for  
 7 the structural integrity of the building. It is highly probable that the cement has been  
 8 impregnated with lead and the ground beneath the cement and outside the building may be  
 9 impacted.” (*Id.*)

10 Thereafter, on March 1, 2011, April 8, 2011, and April 25, 2011, Plaintiff’s counsel at  
 11 the time sent letters to Exide demanding Exide to take action to “mitigate Wattles’ ongoing  
 12 damages” related to the hazardous waste, contamination, and structural integrity issues arising  
 13 out of Exide’s activities. (*See* Pujolar Dec., ¶10, ¶11, and ¶12). Moreover, on April 25, 2011,  
 14 Plaintiff’s counsel provided Exide a copy of Plaintiff’s draft complaint alleging the following:

- 15 • 3.8 In or around January 2011, Wattles retained Environmental Management  
 16 Services (“EMS”) to complete a limited environmental review and assessment  
 17 of the environmental conditions at the Vacated Premises and associated property  
 18 as a result of Exide’s operations. EMS’s investigation verified the presence of a  
 number of environmental issues of concern, including high concentrations of  
 lead, chromium, and hexavalent chromium, and concluded that that presence of  
 these hazardous substances constitute a health and safety issue. ...
- 19 • 3.9 EMS also verified low pH levels on the surface of overhead beams, the  
 20 metal surfaces of the truss structures, and duct systems. EMS concluded that the  
 21 low pH levels constitute a potential problem for the structural integrity of the  
 warehouse building.
- 22 • 3.12 Despite demand, Exide has refused to investigate, address, or remediate  
 23 issues related to the structural integrity of the warehouse building.

- 3.13 Despite demand, Exide has refused to indemnify and reimburse Wattles for costs Wattles has incurred to investigate and address remediation issues related to environmental concerns and structural integrity of the Vacated Premises.
- 3.14 Because of the unremedied environmental, health and safety, and structural concerns resulting from Exide's tenancy of the Vacated Premises, Wattles is unable to market the Vacated Premises and associated property for rent, lease, or sale.

(See Pujolar Dec., ¶12).

The draft complaint attached to Plaintiff's April 25, 2011 letter to Exide includes the same allegations as Plaintiff's complaint ultimately filed against Exide in Pierce County Superior Court on March 28, 2013. (See Pujolar Dec., ¶15). The following time-line unequivocally establishes that Plaintiff was on notice and knew that Exide's former operations were causing damage to the Plaintiff's property prior to purchasing Verlan's policy, effective November 1, 2011:

<i><b>Date</b></i>	<i><b>Document/Evidence</b></i>
August 2, 1999	Lease Addendum acknowledging general and specific damage to the building from Exide's operations. (See Pujolar Dec., ¶5).
January 28, 2011	EMS report identifying building damage, including, but not limited to, burned/charred trusses, extremely corroded metal truss plates and rivets, and stained and pitted concrete. (See Pujolar Dec., ¶9).
March 1, 2011	Letter from Plaintiff's counsel to Exide re: damages from Exide's operations. (See Pujolar Dec., ¶10).
April 8, 2011	Letter from Plaintiff's counsel to Exide re: damages from Exide's operations. (See Pujolar Dec., ¶11).
April 25, 2011	Letter from Plaintiff's counsel to Exide re: Plaintiff's damages related to hazardous waste, contamination, and structural issues arising out of Exide's former activities. <b>Plaintiff's draft complaint attached to letter.</b> (See Pujolar Dec., ¶12).
<b>November 1, 2011</b>	<b>Inception of Verlan's policy no. M00275711, effective November 1, 2011 to November 1, 2012</b>

Plaintiff knew in January 2011 [if not earlier] that Exide's former operations had resulted in damages related to the hazardous waste, contamination, and structural integrity issues arising out of Exide's activities. In January 2011 [if not earlier], Plaintiff had knowledge and was aware of damages allegedly affecting the structural integrity of the building, including burned/charred horizontal truss surfaces, *extremely* corroded metal truss plates and rivets, and the presence of white oxidized material on all of metal surfaces inspected by EMS. Plaintiff was also unquestionably aware of stained and pitted concrete floors and walls. Plaintiff was actively seeking recovery from Exide for damages caused by Exide's operations well in advance of the effective date of Verlan's policy, i.e. November 1, 2011.

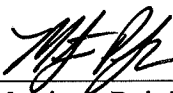
Verlan is not required to provide coverage for damages known by Plaintiff prior to procuring insurance from Verlan. Plaintiff clearly had notice of the alleged loss and damages resulting from Exide's former operation and activities for which Plaintiff now seeks recovery from the defendant insurers prior the inception of Verlan's November 1, 2011 policy period. Plaintiff's claims against Verlan should be dismissed.

## VI. CONCLUSION

Based upon the foregoing, Verlan respectfully requests the Court to enter an order dismissing Plaintiff's claims against Verlan in total with prejudice.

DATED this 18<sup>th</sup> day of June, 2014.

FORSBERG & UMLAUF, P.S.

By:   
 Martin J. Pujolar, WSBA #36049  
 Carl E. Forsberg, WSBA #17025  
 Attorneys for Verlan Fire Insurance Company

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing DEFENDANT VERLAN FIRE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT DISMISSAL RE: PLAINTIFF'S CLAIMS on the following individuals in the manner indicated:

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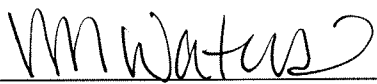
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14 SIGNED this 19<sup>th</sup> day of June, 2014, at Seattle, Washington.

15   
16 \_\_\_\_\_  
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